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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
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Service Rules for the 698-746, 747-762 and 777-792 MHz Bands)	WT Docket No. 06-150
)	
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	
)	
Amendment of Part 90 of the Commission's Rules)	WP Docket No. <u>07-100</u>
)	
)	
Request for Declaratory Ruling filed by the City of Charlotte, North Carolina)	
)	

FOURTH REPORT AND ORDER

Adopted: July 20, 2011

Released: July 21, 2011

By the Commission: Commissioner McDowell issuing a statement.

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I. INTRODUCTION

1. In this *Fourth Report and Order*, we consider a Request for Declaratory Ruling (“Request”) filed by the City of Charlotte, North Carolina (“Charlotte” or “the City”), seeking guidance on the scope of permissible operations under Section 337 of the Communications Act as undertaken by state, local, and other governmental entities in the public safety broadband spectrum of the 700 MHz band.¹ While we

¹ See Request for Declaratory Ruling filed by the City of Charlotte, North Carolina, PS Docket No. 06-229 (filed Mar. 7, 2011) (*Request*); see also 47 U.S.C. § 337(f).

decline to issue the requested declaratory ruling and accordingly dismiss the Request, we find ample notice and record to consider Charlotte's request in the context of the pending rulemaking in this docket. While we disagree with Charlotte's interpretation of the statute, we find that a reasonably broad interpretation of the definition of "public safety services" under Section 337 of the Act would allow some of the uses proposed by Charlotte and other commenters.

II. BACKGROUND

2. The public safety spectrum band at issue in this proceeding is designated for public safety broadband communications (763-768 MHz and 793-798 MHz).² This band is licensed on a nationwide basis to the Public Safety Broadband Licensee ("PSBL").³ In 2007, the Commission, recognizing the need for a nationwide, broadband, interoperable public safety network and difficulties in funding the build out of the network, created a mandatory public-private partnership to facilitate these goals.⁴ The implementation of the Commission's plans, however, faced an immediate obstacle when Auction 73 failed to produce a winning bidder to participate in the partnership.⁵ The Commission subsequently issued both a *Second*⁶ and *Third Further Notice of Proposed Rulemaking*⁷ seeking comment on options to achieve the goal of a nationwide, broadband, interoperable public safety network after the failed auction.

3. After the Commission adopted the *Third Further Notice*, a number of public safety jurisdictions filed petitions for waiver of the Commission's rules to allow them to deploy broadband networks in the public safety broadband spectrum.⁸ On May 11, 2010, the Commission adopted an order granting twenty-one conditional waivers for some of these applicants to pursue early deployment of statewide or regional broadband networks within their jurisdictions.⁹ Charlotte, North Carolina, was among the waiver recipients.¹⁰ Since the Commission issued the *Waiver Order*, a number of additional states and localities have filed waiver requests,¹¹ and the Bureau has granted one additional waiver.¹²

² See Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Second Report and Order*, 22 FCC Rcd 15289, 15406 ¶ 322 (*Second Report and Order*).

³ See *id.*

⁴ *Id.* at 15428 ¶ 386.

⁵ See *id.*; see also Auction of 700 MHz Band Licenses Closes, *Public Notice*, DA 08-595 (rel. Mar. 20, 2008) (700 MHz Auction Closing Public Notice). http://wireless.fcc.gov/auctions/default.htm?job=auCTION_summary&id=73; Auction of the D Block License in the 758-763 and 788-793 Bands, AU Docket No. 07-157, *Order*, 23 FCC Rcd 5421, ¶ 5 (2008) (*D Block Post-Auction Order*).

⁶ See Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Second Further Notice of Proposed Rulemaking*, 23 FCC Rcd 8047 (2008) (*Second Further Notice*).

⁷ Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 14301 (2008) (*Third Further Notice*).

⁸ See Public Safety and Homeland Security Bureau Seeks Comment on Petitions for Waiver to Deploy 700 MHz Public Safety Broadband Networks, 24 FCC Rcd 10814 (PSHSB 2009) (*First Waiver Public Notice*).

⁹ See Requests for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Wireless Broadband Networks, PS Docket 06-229, *Order*, 25 FCC Rcd 5145, 5147 ¶ 7 (2010) (*Waiver Order*).

¹⁰ *Id.* at 5171, app. A.

¹¹ See, e.g., Public Safety and Homeland Security Bureau Seeks Comment on Petitions For Waiver to Deploy 700 MHz Public Safety Broadband Networks, PS Docket No., 06-229, *Public Notice*, 25 FCC Rcd 13155 (Sept. 15, 2010); Public Safety and Homeland Security Bureau Seeks Comment on Additional Petition for Waiver to Deploy (*Continued...*)

4. Several of the more-recently filed petitions for waivers include signatories such as electric utilities. In the *Waiver Order*, the Commission limited use of the networks built pursuant to a waiver to traditional public safety entities, pending resolution of the open question in the *Third Further Notice* addressing the scope of permissible use and users of the nationwide, broadband, interoperable public safety network under Section 337 of the Communications Act.¹³ In seeking comment on these additional waivers, the Public Safety and Homeland Security Bureau (“Bureau”) sought further input on this issue in light of the utility and other signatories to the new waiver requests.¹⁴ Commenters to these Public Notices largely argue that policy favors the inclusion of these users on the network to promote shared disaster response, cost and infrastructure sharing, and funding opportunities.¹⁵

5. In light of this record of support, the Commission again sought comment on this issue in its January 2011 *Fourth Further Notice of Proposed Rulemaking*.¹⁶ Commenters in the rulemaking on this issue generally favor allowing entities like utilities to access the network, assuming that there is sufficient network capacity. Parties differ, however, on the level of access that should be allowed and the legal theory under which such access would or could be permitted. Some utility interests argue that they already satisfy the definition of public safety services and should be afforded primary status as a licensee or lessee in the 700 MHz band.¹⁷ Other utilities and public safety community commenters urge that utilities should have secondary, preemptible access over a shared network, with traditional public safety entities retaining control over the spectrum.¹⁸ Other commenters argue that access by utilities on a

700 MHz Public Safety Broadband Network, PS Docket No. 06-229, *Public Notice*, 25 FCC Rcd 13364 (Sept. 22, 2010); Public Safety and Homeland Security Bureau Seeks Comment on Petitions For Waiver to Deploy 700 MHz Public Safety Broadband Networks, PS Docket No., 06-229, *Public Notice*, 25 FCC Rcd 16932 (Dec. 1, 2010); Request for Waiver filed by the North Central Pennsylvania Regional Task Force, PS Docket No. 06-229 (Nov. 30, 2010); Request for Waiver filed by the City of LaGrange, Troup County, Columbus Consolidated Government, Muscogee County, Coweta County, Fayette County, Harris County, and Heard County, Georgia, PS Docket No. 06-229 (filed Dec. 14, 2010); Request for Waiver filed by the Nashville-Davidson-Murfreesboro-Franklin MSA, Nashville Electric Service, City of Belle Meade, City of Berry Hill, City of LaVergne and Metro Nashville Airport Authority, PS Docket No. 06-229 (filed Dec. 14, 2010); Request for Waiver filed by the Tennessee Valley Regional Communications System, PS Docket No. 06-229 (filed Mar. 18, 2011); Request for Waiver filed by the State of Arkansas, PS Docket No. 06-229 (filed Apr. 5, 2011).

¹² Request for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Broadband Networks, PS Docket No. 06-229, *Order*, DA 11-863 (PSHSB May 12, 2011).

¹³ *Waiver Order* at ¶ 34, 5155.

¹⁴ See, e.g., *supra* n.1.

¹⁵ See, e.g., State of New Mexico PN Comments (filed Oct. 15, 2010); Utilities Telecom Council PN Comments (filed Oct. 18, 2010); State of Florida Department of Management Services PN Comments at 3 (filed Oct. 18, 2010); Great River Energy PN Comments at 2 (filed Oct. 18, 2010); City of Seattle PN Comments at 2-6 (filed Oct. 18, 2010); State of Nevada Department of Transportation PN Comments (filed Oct. 15, 2010). Unless noted otherwise, all comments referenced in this Order were filed in PS Docket No. 06-229.

¹⁶ Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 26 FCC Rcd 733 (2011) (*Third Report and Order* and *Fourth Further Notice*, respectively).

¹⁷ See generally Utilities Telecom Council FNPRM Comments (filed April 7, 2011).

¹⁸ Scana Communications FNPRM Comments (filed Apr. 11, 2011); Southern Company Services FNPRM Comments (filed Apr. 22, 2011); Harris Corporation FNPRM Comments at 31-42 (filed Apr. 11, 2011); LA-RICS FNPRM Comments at 5-6 (filed Apr. 11, 2011); NPSTC FNPRM Comments at 22 (filed Apr. 11, 2011); NYPD FNPRM Reply Comments at 28-29 (filed May 10, 2011); Edison Electric Institute FNPRM Reply Comments (filed May 10, 2011).

primary basis is contrary to the plain language of the statute.¹⁹

6. Following the issuance of the *Fourth Further Notice*, Charlotte filed a Request for Declaratory Ruling seeking clarification of the scope of government use or users under Section 337.²⁰ Charlotte argues that state and local governments have “presumptively as their sole or principal purpose the protection of safety of life, health, and property and are permitted to use the 700 MHz broadband spectrum for activities conducted by their personnel including, but not limited to, activities of police, fire, and medical emergency first responders.”²¹ Charlotte further argues that Section 337 addresses only eligible entities, and not the scope of activities undertaken by such entities using the spectrum, and suggests that once eligibility is met, the actual use of that spectrum by an eligible entity becomes irrelevant.²² Charlotte states that it is not seeking Commission action on the larger issue related to use of the 700 MHz spectrum by utilities or other secondary users.²³

7. Charlotte states that it needs certainty with respect to who is eligible to use the network before it expends any funds on constructing a network pursuant to its waiver, including funds awarded under the Broadband Technology Opportunities Program (“BTOP”) administered by the National Telecommunications and Information Administration (“NTIA”) as a part of the American Recovery and Reinvestment Act (“ARRA”). Charlotte was awarded approximately \$16.7 million for its CharMeck Connect project to deploy an interoperable 700 MHz wireless, broadband public safety network for the city and the greater Mecklenburg County area.²⁴ In explaining the need for a Declaratory Ruling, Charlotte particularly notes two conditions in its BTOP grant. First, Charlotte’s BTOP grant is conditioned on its compliance with the Commission’s requirements and orders in this docket, PS Docket No. 06-229.²⁵ Second, its BTOP grant requires that any BTOP funded assets be limited to use by public safety entities.²⁶ Because the BTOP grant does not specifically define what constitutes a “public safety entity,” Charlotte asserts that Commission guidance is accordingly necessary.²⁷ Charlotte notes in its Request, for example, that it would like to include the City of Charlotte Department of Transportation, as well as the Charlotte/Mecklenburg International Airport, as users, thereby enhancing their ability to serve the public in emergency and day-to-day situations.²⁸ Primary use of this network, however, would remain focused on those government uses that directly support the safety of life, health, and property.²⁹

8. Commenters addressing Charlotte’s Request, including the NTIA, were largely supportive. They support Charlotte’s legal argument that government entities presumptively satisfy the requirements

¹⁹ APCO FNPRM Comments at 9-11 (filed Apr. 11, 2011).

²⁰ *Request*; see also Public Safety and Homeland Security Bureau Seeks Comment on Petition for Declaratory Ruling Asking to Clarify the Scope of Section 337 Regarding the Use by State or Local Government Entities of the 700 MHz Public Safety Spectrum, *Public Notice*, PS Docket No. 06-229, 26 FCC Rcd 4040 (PSHSB 2011).

²¹ Request at 3.

²² *Id.* at 5.

²³ *Id.* at 11.

²⁴ See National Telecommunications and Information Administration, Broadband Technology Opportunities Program, City of Charlotte Grant Award, <http://www2.ntia.doc.gov/grantee/city-of-charlotte> (last visited June 14, 2011).

²⁵ Request at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 12.

²⁹ *Id.* at 11-12.

of Section 337 and offer a variety of policy arguments that also support Charlotte's Request, including the need for public safety flexibility and interoperability and a better ability to meet network costs should the Commission grant the request. Several utilities also filed in support of Charlotte, arguing that their interpretation of Section 337 and the same policies support inclusion of investor-owned utilities on these networks.

III. DISCUSSION

9. Under Section 1.2 of its rules, the Commission "may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."³⁰ The Commission has broad discretion whether to issue such a ruling.³¹

10. Charlotte, however, seeks a declaratory ruling on a matter of statutory interpretation (specifically, Section 337) that has already been raised and remains an open issue in the above-captioned rulemaking. Issuing a declaratory ruling apart from this rulemaking – without taking into account the portions of the rulemaking record relevant to Charlotte's request – would unnecessarily and inappropriately truncate the rulemaking process governed by the Administrative Procedure Act.³² Accordingly, we dismiss the request. While Charlotte attempts to segregate its request from the larger statutory interpretation issue under review in the *Fourth Further Notice*, Charlotte's request is in fact a subset of this issue that is being considered in the pending rulemaking. While we are not prepared to resolve all of the questions raised in the rulemaking related to the interpretation of Section 337(f), we believe that Charlotte's concerns can and should be resolved in the rulemaking at this time. As discussed below, we find that a variety of governmental uses of the public safety network are appropriate and permissible under Section 337, as long as each of the prongs of the statute is met. We also conclude that many of the uses proposed by Charlotte and other commenters would satisfy the terms of the statute. We find it inappropriate and contrary to the statute, however, to apply a presumption that all governmental uses satisfy the terms of Section 337. Rather, use is a vital element of the test under Section 337(f)(1)(A) and must be considered as a factual matter.

11. Finally, while we recognize the importance of addressing the matter of the scope of non-governmental uses, such as by some utilities, we limit our conclusions today to governmental uses under Section 337(f)(1)(B)(i). In this respect, we find that the record compiled on the issue of permissible non-governmental use of the network requires more detailed analysis to fully consider the variety of legal theories and practical considerations at issue, including the factual basis for the assertion that such uses satisfy the statute, primary versus secondary access, how such access or authorization would be implemented, and the policy considerations associated with any permitted access to the network.

A. OVERVIEW OF SECTION 337

12. Section 337 of the Communications Act governs the use of the 700 MHz band of spectrum. Section 337(f)(1) defines what constitutes "public safety services" for which the 700 MHz public safety spectrum is allocated:

(f) Definitions:

For purposes of this section:

³⁰ 47 C.F.R. § 1.2.

³¹ See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973); Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, CC Docket No. 95-116, *Order*, 19 FCC Rcd 6800, 6810 ¶ 20 (2004).

³² See U.S.C. § 553.

(1) Public safety services

The term “public safety services” means services—

(A) the sole or principal purpose of which is to protect the safety of life, health, or property;

(B) that are provided—

(i) by State or local government entities; or

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.³³

13. In the *Fourth Further Notice*, we sought comment on each element of this definition, to supplement the record regarding similar questions posed in the *Second* and *Third Further Notices*.

14. In the first instance, we find that while Section 337 does not speak directly to the issue, the best interpretation of the statute provides that the term “public safety services” is directed towards the communications service being provided by the entity in question, rather than the underlying service provided by the entity, in determining the use of the spectrum. That is, the entity making the communications need not be a police, fire, or emergency medical entity, but the communications undertaken must solely or principally be used to protect the safety of life, health, or property.³⁴ In this respect, and as illustrated by the remainder of Section 337(f)(1), public safety services may be provided by a variety of entities, including governmental and authorized non-governmental entities.³⁵ Section 337(a) also supports the reading that the “service” in question is a communications service, given that the contrasting point made with respect to statutory allocation of spectrum is spectrum for “commercial use” assigned by competitive bidding.³⁶

15. With this base interpretation of Section 337(f)(1), we turn to the specific elements under Section 337(f)(1)(A)-(C) and Charlotte’s proposed interpretation of the statute.

B. GOVERNMENT USE

16. In its Petition, Charlotte argues that government users satisfy the definition of public safety services regardless of the actual use to which such users put the network and that such users are, by their nature, using the network solely or primarily to protect the safety of life, health, and property. In this respect, Charlotte contends that the definition addresses the eligibility of entities to use the 700 MHz spectrum and not the scope of activities they may undertake on 700 MHz spectrum.³⁷ Charlotte states that this conclusion is implicit in the Commission’s prior treatment of licensing in the 700 MHz band, as

³³ 47 U.S.C. § 337(f).

³⁴ By the same token, an entity (governmental or non-governmental) that devotes its non-communications operations principally to protecting the safety of life, health, or property will not be considered to be using its license for Section 337(f) public safety services if it is not using its licensed spectrum solely or principally in support of the protection of the safety of life, health, or property.

³⁵ *Id.* at § 337(f)(1)(B).

³⁶ *Id.* at § 337(a) (providing that the Commission allocate 24 MHz of 700 MHz spectrum to “public safety services” and 36 MHz for “commercial use” to be assigned by competitive bidding pursuant to Section 309(j)).

³⁷ Request at 5.

embodied in Section 90.523 of the Commission's rules. To this end, Charlotte cites a number of entities licensed for use in the 700 MHz narrowband spectrum as examples of entities that would not normally fall under the rubric of police, fire, or emergency medical services. Accordingly, Charlotte asks "the FCC to confirm explicitly what the rulings in PS Docket No. 06-229 and the processing of 700 MHz narrowband applications indicate implicitly: Territories, possessions, states, counties, towns or similar State or local governmental entities that qualify as 700 MHz lessees/users have as their sole or principal purpose the protection of the safety of life, health and property and are permitted to use 700 MHz broadband spectrum for activities conducted by their personnel including, but not limited to, activities of police, fire and medical emergency first responders."³⁸ Charlotte asserts that it is "axiomatic that the 'principal purpose' of governmental entities is the protection of the lives, health and property of their citizens."³⁹

17. The majority of commenters addressing the Charlotte petition support the city's request. APCO; the City of McAllen, Tex.; and others urge the Commission to retain the licensing eligibility rules contained in Sections 90.523 and 90.20 of its rules and allow governmental entities to hold 700 MHz licenses without any additional restrictions as to the use of this spectrum.⁴⁰ In this respect, the relevant portion of Section 90.523 addressing government licensing states:

This section implements the definition of public safety services contained in 47 U.S.C. 337(f)(1). The following are eligible to hold Commission authorizations for systems operating in the 763–775 MHz and 793–805 MHz frequency bands:

(a) *State or local government entities.* Any territory, possession, state, city, county, town, or similar State or local governmental entity is eligible to hold authorizations in the 764–776 MHz and 794–806 MHz frequency bands.⁴¹

18. The state of New Mexico similarly argues that the Commission's prior determination not to require any showing beyond the identity of the party as a governmental entity was correct, suggesting that local government entities are entitled to the presumption Charlotte seeks. In this respect, so long as the entity in question is a governmental entity, all official governmental communications would be permitted under the statute. Specifically, New Mexico cites the Commission's 1998 rulemaking addressing eligibility for licensing in the 700 MHz band, in which the Commission stated, "[W]e conclude that state or local governmental entities are eligible for licensing in the 700 MHz band without further showing as to eligibility. We acknowledge, in this regard, our departure from the Second Notice's tentative conclusion that certain state and local government entities would be ineligible for licensing under the statutory definition of public safety services. We are adopting a more inclusive interpretation today because, as suggested by many commenters, the more inclusive definition better reflects the statutory intent."⁴²

³⁸ *Id.* at 3.

³⁹ *Id.* at 9.

⁴⁰ APCO Declaratory Ruling Comments at 3 (filed Apr. 11, 2011); *see also* McAllen, Tex. Declaratory Ruling Comments at 1-2 (filed Apr. 5, 2011); Iowa Statewide Interoperable Communications System Board Declaratory Ruling Comments at 2 (filed Apr. 2, 2011); Seattle Declaratory Ruling Comments at 1-2 (filed Apr. 11, 2011).

⁴¹ 47 C.F.R. § 90.253.

⁴² New Mexico Declaratory Ruling Comments at 5-6(citing The Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Services, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, 14 FCC Rcd 152 at ¶ 54 (1998) ("1998 Order")).

19. IMSA agrees, arguing that Section 337 applies to entities, not to activities conducted over the spectrum, and accordingly governmental users inherently satisfy the statute's requirements.⁴³ Motorola also contends that Section 337 applies to the entity rather than the use of the spectrum, stating that Charlotte's interpretation "properly embraces secondary responders associated with city or governmental organizations," including public works and public utilities.⁴⁴ Motorola concedes, however, that the most ideal solution would be for Congress to amend the statute to grant local governments the authority to determine eligible users.⁴⁵ NTIA further supports Charlotte's assertion that state and local government entities presumptively satisfy Section 337's requirements and adds that such a determination by the Commission would help ensure the viability of BTOP grant recipients' systems.⁴⁶ Commenters also support the policy of allowing diversified use of the spectrum by governmental entities, citing a greater ability to spread the costs of the network among users, spectrum efficiency, enhanced interoperability and coordination during disasters, and other logistical considerations.⁴⁷

20. In responding to the *Fourth Further Notice*, commenters similarly urged the Commission to be broadly inclusive in determining who may use the 700 MHz public safety spectrum. The Bay Area, which is also part of a BTOP project, states that any governmental users with the sole or principal purpose of protecting the safety of life, health, or property should be permitted to use the 700 MHz public safety spectrum, as should "other users required for successful response and recovery event coordination."⁴⁸ It argues that government use qualifying under Section 337 would include "public hospitals and public health agencies, housing inspectors, agencies that maintain streets and public rights-of-way, agencies that enforce parking and traffic laws and transportation agencies."⁴⁹ The New York Police Department urges the Commission "to broaden its interpretation of Section 337 to include all government entities, local, county, State, Tribal and Federal" as well as utilities.⁵⁰

21. However, a number of commenters disagree with the idea that the identity of the user should solely control who can use the spectrum, urging the Commission to consider the use, as well as the user, in contemplating participation on the 700 MHz public safety broadband network. For example, while APCO asserts that Section 337(f)(1)(B), as embodied in Section 90.523, allows governmental entities and authorized non-governmental entities such as volunteer fire departments and private ambulance services to hold 700 MHz licenses, APCO further asserts that utilities could not be licensees or lessees because they fail the "sole or principal purpose" test.⁵¹ In this respect, however, APCO fails to distinguish why the sole or principal purpose requirement is operative with respect to non-governmental users but not with respect to governmental users. Conversely, the Utilities Telecom Council argues that utilities satisfy the

⁴³ IMSA Declaratory Ruling Comments at 3 (filed Apr. 11, 2011); LA-RICS Declaratory Ruling Comments at 1-2 (filed Apr. 11, 2011).

⁴⁴ Motorola Declaratory Ruling Comments at 2 (filed Apr. 11, 2011).

⁴⁵ *Id.* at 4.

⁴⁶ NTIA Declaratory Ruling Comments at 2 (file Apr. 8, 2011).

⁴⁷ APCO Declaratory Ruling Comments at 2 (filed Apr. 11, 2011); Berks County, Pa. Declaratory Ruling Comments at 1 (filed Apr. 11, 2011); IMSA Declaratory Ruling Comments at 4-5 (filed Apr. 11, 2011); Iowa Statewide Interoperable Communications System Board Declaratory Ruling Comments at 2 (filed Apr. 11, 2011); McAllen, Tex. Declaratory Ruling Comments at 2 (filed Apr. 11, 2011); New Mexico Declaratory Ruling Comments at 3 (filed Apr. 22, 2011); City of Tucson, Ariz. Declaratory Ruling Comments at 1-2 (filed Apr. 11, 2011); Virginia Beach Declaratory Ruling Comments at 2 (filed Apr. 11, 2011).

⁴⁸ San Francisco Bay Area FNPRM Comments at 29 (filed Apr. 11, 2011).

⁴⁹ *Id.*

⁵⁰ NYPD FNPRM Reply Comments at 29.

⁵¹ APCO FNPRM Comments at 10.

sole or principal purpose requirement, as well as the other elements of the statute.⁵² Here as well, however, commenters fail to provide a rationale for distinguishing one class of Section 337(f)(1)(B) users from another with respect to the need to also satisfy Section 337(f)(1)(A), and we believe there is none.

22. We find that Petitioner's and commenters' focus on user over use with respect to governmental entities is inconsistent with the plain language of the statute, which defines "public safety services." Rather, we must consider both use *and* user in the manner addressed by the components of the definition. In particular, accepting Charlotte's reading of the statute would render Section 337(f)(1)(A) superfluous with respect to governmental users, insofar as that section requires that public safety services be services "the sole or principal purpose of which is to protect the safety of life, health, or property."⁵³ If Congress had intended to rely solely on the identity of the user as a governmental entity, there would have been no need to specify that the sole or principal purpose of the service provided must be to protect the safety of life, health, or property. Rather, Congress could simply have required that the user either be a governmental entity or an authorized non-governmental entity, as specified in Section 337(f)(1)(B), whose sole or principal purpose for the service was to protect the safety of life, health, or property. Instead, Congress structured the definition to require both a certain type of use (without any qualifier as to the user (described in subsection (f)(1)(A))) and certain types of users (described in subsection (f)(1)(B)) in order for the services to qualify as "public safety services."

23. Moreover, while Petitioner and several commenters focus on the Commission's earlier determination declining to adopt a more rigorous test for licensing beyond the identity of the licensee as a state or local government, the Commission specifically noted at that time that, once licensed, "the spectrum must be used for services whose sole or principal purpose is to protect the safety of life, health or property."⁵⁴ Further, while Petitioner points out that a number of 700 MHz narrowband licensees include governmental transit agencies and others under Section 90.523, which is consistent with the licensing determination made in 1998, Petitioners and commenters fail to note the language cited above in the 1998 Order specifically acknowledging the statute's "use" requirement. They also fail to note that the *Third Further Notice* specifically proposed to amend Section 90.523 to clarify that use of the spectrum by 700 MHz licensees must conform to all of the prongs of Section 337, including the sole or principal purpose restriction.⁵⁵

24. In particular, the *Third Further Notice* considered revisions to Section 90.523 seeking to ensure that the services provided by the PSBL conformed to all of the terms of Section 337.⁵⁶ There, the Commission noted in particular that "the question of whether the [PSBL]'s service qualifies as a 'public safety service' ... depends in part on the nature of the spectrum use by the entities to which it grants access to the shared broadband network."⁵⁷ In this regard, the Commission further expounded that, under Section 337, in theory the PSBL could provide access to users for purposes that do not principally involve safety of life, health, or property, so long as the principal use of the network remained for these purposes. However, the Commission posited that such an approach appeared to be inconsistent with the statute, as this could allow the existence of pockets of services or geographies wholly unrelated to public safety.⁵⁸ The same logic would apply to Charlotte or to any other government use under the principal purpose

⁵² See generally Utilities Telecom Council FNPRM Comments.

⁵³ 47 U.S.C. § 337(f)(1)(A).

⁵⁴ 1998 Order, 14 FCC Rcd at 180-81, ¶ 54.

⁵⁵ See *id.*; see also *Third Further Notice*, 23 FCC Rcd at 14404-05 ¶ 322.

⁵⁶ See *Third Further Notice*, 23 FCC Rcd at 14403 ¶ 316.

⁵⁷ See *id.*

⁵⁸ *Id.* at ¶ 318.

analysis.

25. Thus, we find that even if the spectrum is *licensed* to a particular entity based on the identity of the *user* under Section 337(f)(1)(B), such *use* must also conform to the terms of Section 337(f)(1)(A). Accordingly, even though Charlotte and other governmental entities have access to the spectrum as an eligible licensee or lessee, the uses by its personnel must also be restricted to those uses that conform to the “sole or principal purpose” prong of Section 337(f)(1)(A).

26. However, we also find that we have discretion to determine, within the statute, what types of activities the communications service must support in order to satisfy the requirement that the sole or principal purpose of the service is the protection of the safety of life, health, or property. In this respect, Charlotte notes that users of its network may include the City of Charlotte Department of Transportation and the Charlotte/Mecklenburg International Airport, both for day-to-day and emergency communications.⁵⁹ With respect to uses by the Department of Transportation and the Charlotte/Mecklenburg International Airport, any use by these entities must adhere to the “sole or primary purpose” clause of Section 337(f)(1)(A). While emergency communications would clearly qualify as having the requisite safety purpose, day-to-day communications may or may not. We would anticipate, however, that many types of routine communications uses would qualify. Although Charlotte does not expand on what these uses might be, transportation departments are generally responsible for the safety of motorists and passengers on public transportation, the safety of public highways, and generally ensuring the safety of travelers. Waiver recipient Seattle advocates for the inclusion of transportation departments as well, stating that such governmental units “have a primary purpose of allowing traffic to flow freely through cities and states. Over 30,000 lives are lost on the highways of the nation each year. A significant number of those deaths directly relate to the design, construction and maintenance of traffic arteries.”⁶⁰ In this respect, Seattle argues that transportation departments among other things design and maintain roadways and install and maintain traffic signals and signs, and accordingly “the work of these departments has a direct relationship with the ‘safety of life’ and the ‘safety of property’ (e.g. automobiles, property adjacent to roadways).”⁶¹ Safety and homeland security has become a prominent issue within the purview of airport authorities since the attacks of September 11, 2001, requiring heightened daily security at airports to guard against terrorism. Moreover, ensuring the routine safety of airline passengers, crews, and airport personnel and property in a complex air transportation environment requires vigilance and close coordination and communication. To the extent the spectrum covered by a license is solely or primarily used for communications that support these types of activities, we agree that the licensed communications services would meet the “sole or principal purpose” element of the Section 337 definition of “public safety services.”

27. Other commenters also offered examples of governmental users and uses. LA-RICS, also a BTOP recipient, describes uses by “secondary responders” in response to wildfires and flooding in 2009 as examples of uses that should be permitted on the 700 MHz spectrum. Secondary users in this instance included the Department of Animal Control rescuing large animals from the fire and entities closing off streets and directing evacuations from floods and determining when homes were safe for return by residents.⁶² LA-RICS also cited coordinated efforts by the California Highway Patrol, City of Los Angeles Fire, City of Los Angeles Department of Water and Power, Los Angeles County Public Works, and the Los Angeles County Sheriff and Fire Departments to ensure resident safety and maintain access to neighborhoods affected by flooding following the 2009 wildfires.⁶³ These emergency response functions

⁵⁹ Request at 12.

⁶⁰ Seattle Declaratory Ruling Comments at 2.

⁶¹ *Id.*

⁶² LA-RICS FNPRM Comments at 3-4.

⁶³ *Id.* at 4.

protect the safety of animals, homes, and city infrastructure, as well as that of residents in the path of an impending wildfires and floods – all prime examples of the protection of life, health, and property. Accordingly, a network that is solely or principally devoted to communications that support these functions will be considered to provide services that meet the “sole or principal purpose” element of the Section 337 definition of “public safety services.”

28. In addition to the potential transportation uses discussed above, waiver recipient Seattle cites a number of governmental functions that it argues protect the safety of life, health, or property that are not provided by traditional “public safety” entities. For example, Seattle states that city planning and development carried out by building departments “have a primary purpose of insuring building construction complies with codes which protect the safety of the building’s users and inhabitants.”⁶⁴ Seattle also notes that “[z]oning codes exist to separate uses of property, thereby protecting the health of residents and workers.”⁶⁵ Seattle argues that recent events such as earthquakes in Japan, New Zealand, and Haiti clearly indicate the direct relationship between the “safety of life,” “safety of property,” and the work of such departments.⁶⁶ We also find that in light of the clear-cut public safety character of the work that is described as being performed by the Seattle departments, communications supporting this work would similarly be treated as having the requisite protective safety character when considering whether the overall purpose of the licensed use at issue is for “the sole or principal purpose” of “protect[ing] . . . the safety of life, health, or property” under Section 337(f)’s definition of “public safety services.”

29. Finally, we address briefly the “not commercially available” requirement of Section 337(f)(1)(C) with respect to governmental uses of spectrum. As discussed above, the “service” in question is the communications service offered by the governmental entity. We find this prong satisfied as long as the communications services of a public safety broadband 700 MHz network are used for internal communications purposes in support of the governmental mission.

IV. CONCLUSION

30. We find that the presumption that Charlotte seeks that any use of a public safety broadband network in the 700 MHz band by a government entity is permissible is not supported by a plain reading of the statute. However, we find that there is sufficient flexibility within the statute to encompass many of the uses contemplated by Charlotte and many of the commenters. While we have not opined as to all of the possible uses of the 700 MHz spectrum that would meet each of the prongs of the statute, we believe we have provided an adequate structure for analyzing the statute that can provide guidance to government entities seeking to determine who may use its systems in this spectrum and how those systems may be used in order to qualify as “public safety services” under Section 337(f). To the extent that any doubt remains as to a particular use, parties may seek a declaratory ruling pursuant to Section 1.2 of our rules.⁶⁷ We delegate authority to the Public Safety and Homeland Security Bureau to consider specific uses proposed by a government user and issue a ruling as appropriate.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

31. This *Fourth Report and Order* does not promulgate any “rule” as that term is defined in the

⁶⁴ Seattle Declaratory Ruling Comments at 2.

⁶⁵ *Id.* at 2.

⁶⁶ *Id.* at 2-3. Seattle also argues that government-run utility departments have a primary purpose of providing electricity, water and gas, and removing wastewater and solid waste from the properties in a city or county, and that fouled water, failure to remove wastewater, and lack of electricity can each result in immediate damage to lives and property. As noted herein, however, we are deferring a determination regarding utility use at this time.

⁶⁷ 47 C.F. R. § 1.2.

Regulatory Flexibility Act,⁶⁸ so the Commission is not required to prepare a Final Regulatory Flexibility Analysis at this stage of this proceeding.

B. Paperwork Reduction Act of 1995

32. *Paperwork Reduction Act of 1995.* This document contains no new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

VI. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201(b), and 337 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154, 201(b), 337, and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Request for Declaratory Ruling filed by the City of Charlotte, North Carolina, IS DENIED.

34. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), 5(c), 7, 10, 201, 202, 208, 214, 301, 302, 303(r), 307, 308, 309, 310, 311, 314, 316, 319, 324, 332, 333, 336, 337, 614, 615, and 710 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 155(c), 157, 160, 201, 202, 208, 214, 301, 302, 303(r), 307, 308, 309, 310, 311, 314, 316, 319, 324, 332, 333, 336, and 337, this *Fourth Report and Order* in PS Docket No. 06-229 IS ADOPTED and shall become effective upon publication in the Federal Register.⁶⁹

35. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of the *Fourth Report and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

⁶⁸ See 5 U.S.C. § 601(2).

⁶⁹ Because the *Fourth Report and Order* imposes no immediate obligations on any party, we find that good cause exists for making the *Fourth Report and Order* effective upon publication in the Federal Register.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

RE: *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229; Amendment of Part 90 of the Commission's Rules, WP Docket No. 07-100; Fourth Report and Order, FCC 11-113*

I support this order and I thank the team in the Public Safety and Homeland Security Bureau for their thorough and thoughtful analysis. Today, we affirm that local governmental entities may make their own decisions about the users and uses permitted on their broadband networks within the bounds of the statute. We provide flexibility and certainty for the city of Charlotte, North Carolina and all of the jurisdictions moving ahead to construct broadband networks pursuant to Commission waiver.

I have long been a proponent of flexible spectrum use. As illustrated here, old-style "command and control" policies would needlessly hamper those who are in the best position to understand and satisfy their individual requirements. Moreover, on a practical level, allowing additional users to access the network will provide these communities with needed revenue for build-out and maintenance. Certainly Congress had these benefits in mind when defining "public safety services" broadly.

I look forward to continuing to work with Congress, my Commission colleagues and all interested parties to improve the ability of public safety entities to achieve interoperability in an efficient, timely manner.